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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

RUPINDER SINGH SANDHU,

Defendant and Appellant.

C056278

(Super. Ct. No.
CRF 05-413)

A jury convicted defendant Rupinder Singh Sandhu of two counts of felony sexual battery (Pen. Code, § 243.4, subd. (a)), and one count of false imprisonment (Pen. Code, § 236). Defendant was placed on five years' probation, with a 365-day term in county jail as one of the conditions.

On appeal, defendant contends evidence of prior sexual misconduct was improperly admitted under Evidence Code section 1108 and prosecutorial misconduct during the closing argument violated his due process rights. We affirm.

BACKGROUND

On the morning of January 12, 2005, Eva Z. heard a knock on the door of her mobile home. Defendant was at the door and asked to see Eva's roommate, Tiffany T.

Eva regularly went to the store where defendant worked. She was friendly with him, although they never socialized, and defendant had never before been to her house.

Eva told defendant Tiffany T. was not there. She started to shut the door, but defendant blocked it from closing and entered her home. As Eva sat on a nearby stool, defendant tried to talk to her about a leak in the ceiling, saying he or a family member had fixed the ceiling at Tiffany T.'s father's house.

After Eva repeated that Tiffany T. was not home, defendant got mad when Eva told him he could not wait for Tiffany T. and that he needed to leave. He then started to touch Eva, putting his mouth "everywhere" on her, "making out" with Eva's neck and chest, while also grabbing her rear end and thighs.

Eva was in shock from the assault. Defendant started "grinding" on her, placing his "private area" on her "private area." While his pants were unzipped and unbuttoned, defendant started to reach down Eva's pants, causing Eva to jump and tell him to leave. He came back towards Eva and ripped her sweater, kissing her on the shoulder as she started to push him. Eva grabbed defendant's keys and again told him to leave, but he shut and locked the door, threw his keys on the counter, and told Eva he would leave when he is ready. Defendant then grabbed Eva from behind as she went to the door, holding her in a bear hug.

Eva used her head to hit defendant as he held her from behind. She ran to the door, opened it, and told defendant to

go. Defendant looked at her and said it was not over. He then took his keys, went outside to his truck, smoked a cigarette, and waited for about 20 minutes before leaving.

Defendant twice kept Eva from moving during the incident, first holding her against a counter and then later grabbing her from behind. One of Eva's breasts, which defendant tried to touch, was partially exposed during the assault. Eva resisted, but defendant managed to put his mouth on the upper part of her breast. Before she got him to leave, defendant was trying to touch every part of Eva's body.

The entire incident took place three to four feet from the front door. According to Eva, she tried to escape four times, only succeeding in her last attempt. Eva called her friend Ashley Manduca after the incident, but the call went to Manduca's voice mail and Eva left a message.

Eva sat on the floor and cried after defendant left. About three minutes later, Manduca and Tiffany T. arrived at Eva's place. Eva did not immediately call the police as she had to appear in court that day for a welfare fraud case against her.

She "flipped out" when Manduca's car arrived, got into the car and went to court, reporting the incident to law enforcement after her court appearance. A female sheriff's deputy swabbed her breast area for DNA. The parties stipulated saliva on Eva's left breast contained defendant's DNA.

Manduca first arrived at Eva's home around 7:30 a.m. on the day of the incident. She and Tiffany T. left to go on errands at around 8:00 a.m., planning to return by 9:00 a.m. because Eva

had a 10:00 a.m. court appearance. While they were out, Manduca got a voice mail in which a hysterical sounding Eva asked Manduca to call her.

After Manduca listened to the voice mail, she and Tiffany T. hurriedly returned to Eva's home. Tiffany T. ran to the trailer. Eva soon ran out to Manduca in the car, grabbing and holding her. Manduca then left to get a money order from the bank before the court appearance, leaving Eva with Tiffany T.

Yuba County Sheriff's Deputy Brett Felion took a report from Eva. She told him her bra and sweater had been damaged in the assault. He saw the sweater had been damaged but saw no damage to the bra, and observed no injuries on Eva. Eva identified defendant from a photographic lineup.

Deputy Felion interviewed defendant on January 15, 2005. Defendant gave a *Miranda*¹ waiver, and said he went to Eva's residence to see Tiffany T. Until Eva answered the door, defendant did not know she lived with Tiffany T. Through the open doorway, he talked to Eva about repairing the roof and then left.

Defendant first told the deputy he had never entered Eva's residence. He later changed his statement, admitting he entered the trailer, spoke with Eva, and they hugged each other before he left. Defendant said he had been invited in, and the entire

¹ *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

conversation took about five minutes. He denied engaging in any sexual conduct with Eva.

Defendant said Tiffany T. had invited him over, but he left work sick that morning and went to tell Tiffany T. he would not be able to come by later. When asked about various specific allegations of sexual misconduct made by Eva, defendant gave no response or told the deputy he had told him everything already.

Over defendant's objection, evidence was admitted regarding defendant's prior sexual misconduct. In April 1986, Maria B. was working the graveyard shift in a Napa convalescent home. She left on her lunch break one morning at 2:00 a.m. and drove to a nearby 7-Eleven to get snacks. Bending over to get Cheetos, she was grabbed from behind by defendant, the only other person in the store.

Maria had seen defendant many times before at the store, although they did not socialize. She asked defendant to leave her alone as he managed to get his hand inside her shirt and touch her breast.

They struggled for about five minutes until Maria was able to get away. In shock, Maria went to the counter and paid defendant for the Cheetos. As Maria started to leave the store, defendant grabbed her from behind and gave her two large, painful hickies on the neck. She was able to get away after another struggle, and, as she got into the car, defendant said to her, "Come back later. Come back later."

Maria returned to work and told her coworkers after one of them noticed the hickies. Napa Police Officer Gary Grassi

responded to the call and interviewed Maria, took her statement, and then took her to the store where she identified defendant.

The People introduced an information and a redacted abstract showing that on April 11, 1986, defendant, having been charged with sexual battery (Pen. Code, § 243.4) and false imprisonment (Pen. Code, § 236), was convicted on two lesser included offenses.

DISCUSSION

I

Pursuant to Evidence Code section 1108, the court allowed, over defendant's objection, evidence of defendant's 1986 sexual assault against Maria which resulted in his prior convictions. On appeal, defendant argues the court's ruling was a prejudicial abuse of discretion, violating due process. We disagree.

Evidence Code section 1108 is an exception to the general prohibition on propensity evidence and permits the admission of other sex crimes, in a sex offense prosecution, for the purpose of showing a defendant's propensity to commit such crimes. The admissibility of this evidence is subject only to the weighing of probative value and prejudicial impact under Evidence Code section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) In deciding whether to admit sexual assault evidence under Evidence Code sections 1108 and 352, the trial court should consider its probative value, its potential to evoke an emotional bias unrelated to guilt, its capacity to consume time, its chronological remoteness, and its capacity to distract the jury

from the present offense. (*People v. Falsetta, supra*, 21 Cal.4th at p. 917; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-740 (*Harris*).) We review decisions to admit evidence under Evidence Code section 352 for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

In admitting the prior sexual misconduct evidence, the court found the remoteness of the nearly 20-year-old incident was offset by the close similarity between the charged and uncharged offenses. The court also found the current offense was more inflammatory than the prior misconduct, and the prior offense resulted in a conviction, minimizing the risk that the jury would use the current charge to punish defendant for the prior offenses.

Citing *Harris*, Defendant argues the 19 years between the current and prior offenses, and defendant's "blameless life" between them warranted exclusion under Evidence Code section 352. At issue in *Harris* was whether a prior act of sexual violence should be admitted in a sexual assault case. (*Harris, supra*, 60 Cal.App.4th at p. 730.) The defendant, Harris, was a mental health nurse at a treatment center; he was accused of fondling, kissing and sexually preying on women who were vulnerable due to their mental health conditions. (*Id.* at pp. 730-732.) The prosecution sought to introduce evidence of a prior sex offense that was extremely violent; the evidence described a viciously beaten and bloody victim. (*Id.* at p. 738.)

This case is clearly distinguishable from *Harris*. The testimony gave a complete account of the prior incident, which did not involve more inflammatory conduct than the charged crimes. (See *Harris, supra*, 60 Cal.App.4th at p. 741.) The prior crime evidence also consumed less time than the one in *Harris*, and, unlike *Harris*, did not require more detailed instructions and admonitions than normal for prior sexual misconduct evidence. (See *id.* at p. 739.) The prior sexual misconduct evidence was less likely to confuse the jury, who knew the prior conduct resulted in convictions, albeit for unnamed lesser offenses. (See *id.* at pp. 738-739.)

One possible source of confusion was the court's less than ideal attempt at redacting the punishment from the abstract of the 1986 convictions. The abstract submitted to the jury showed a blacked out space in the area reserved for probation, while the areas describing fines, jail, restitution, and prison were left blank. The specific code sections defendant was convicted of were blacked out, but next to the two blacked out convictions were the spaces "F" and "M", presumably for felony and misdemeanor. The space for "F" was blank, while the space for "M" was marked with an "X" next to both crimes. Defendant correctly argues a jury could conclude from this that defendant received probation rather than a prison or jail term from his prior conviction, and might have inferred he had been convicted of misdemeanors.

Although a jury may have concluded defendant was given probation, it knew defendant had been convicted as a result of

the prior sexual assault. Any confusion of the issues from this abstract was minimal, and defendant's conviction on the prior offenses is a point in favor of admitting the evidence.

Although there is no "bright-line rule" for determining when an offense is too remote to be relevant (*Harris, supra*, 60 Cal.App.4th at p. 739), the nearly 20 years between the prior and current offenses diminishes the relevance of the prior misconduct. (*People v. Burns* (1987) 189 Cal.App.3d 734, 738 ["a conviction that is 20 years old . . . certainly meets any reasonable threshold test of remoteness].")

However, unlike *Harris*, defendant's prior misconduct is very similar to the charged offenses. Both the current offense and the prior sexual assault involved a sudden attack on a lone woman whom defendant knew from his job at a convenience store. In each case defendant suddenly grabbed for the woman and groped her, renewing the assault after his victim initially broke free. Defendant used his mouth on his victim in both cases, and grabbed for both victims' breasts. Although there are factual differences between the two -- the prior sexual assault took place at night in a business while the current crimes were in the morning at a private residence, and involved more extensive assaults -- in essence, the current and prior crimes involve the same type of surprise sexual assault against an acquaintance of defendant.

This point is central to distinguishing *Harris*. A remote offense is less likely to be admitted because the passage of time makes it less likely that defendant has a propensity to

commit the charged crime. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285 (*Branch*).) But if "the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses," potentially "balancing out" the prior offense's remoteness. (*Ibid.*) Thus even a 30-year-old prior offense is admissible if the charged and uncharged acts are sufficiently similar. (*Id.* at pp. 284, 285-287.)

"The prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." [Citations.] "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." [Citation.] Painting a person faithfully is not, of itself, unfair." (*Harris, supra*, 60 Cal.App.4th at p. 737.)

The court has broad discretion in determining whether to exclude prior sexual misconduct under Evidence Code section 352. Indeed, the trial court's exercise of discretion will be reversed "only if [its] ruling was 'arbitrary, whimsical, or capricious as a matter of law. [Citation.]' [Citation.]" (*Branch, supra*, 91 Cal.App.4th at p. 282.) The remoteness of the prior convictions in this case was balanced out by the similarity between the charged and uncharged conduct. The prior offenses were not likely to confuse the jury, did not require an undue amount of time, were not inflammatory, and, due to their great similarity to the charged crimes, were highly probative.

The court did not abuse its discretion in admitting defendant's prior sexual misconduct evidence.

II

The prosecutor made the following statement during the closing argument:

" . . . I would submit to you that [Maria's] testimony, in fact, establishes that the Defendant committed that offense back in 1986. What is interesting about that particular offense is that the Defendant assaults a woman in her early 20's, a convenience store customer, attacks her from behind, and starts grabbing at her breasts. She fights him off, takes about five minutes or so, and then she goes and puts her money on the counter to pay for her purchase. She didn't run screaming out of the store. And when I asked her, 'Why did you pay for the Cheetos?' She told you that she was in shock; that getting grabbed and getting groped had basically stunned her. So for a period of time after that happened, she wasn't thinking clearly.

"I would submit to you that is not an uncommon reaction. In fact, it is the same reaction that the victim in this particular case had when I asked her, 'Call 9-1-1?' She didn't. And she doesn't know why. Both victims reacted in a very similar reaction [*sic*], and that is something that you can consider."

The jury was instructed with CALJIC No. 2.50.01, which allowed it to infer defendant was likely to commit the charged sexual offenses if it found he committed the prior sexual offense. Defendant never objected to the argument, but now

argues the prosecutor's comment misstated the law by allowing the jury to infer guilt from the victims' similar reactions rather than defendant's propensity to commit the charged and uncharged offenses.

Since any error would have been cured by a timely objection and admonition from the court, defendant's claim is forfeited on appeal. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Defendant argues the failure to object constituted ineffective assistance of counsel. He is mistaken.

"A defendant claiming ineffective representation bears the burden of proving by a preponderance of the evidence both (1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome." (*In re Ross* (1995) 10 Cal.4th 184, 201.) "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

The prior sexual assault was strong evidence of defendant's propensity to commit the very similar current offenses. Objecting to the prosecutor's statement regarding the shock to the victim common to both incidents would only illuminate the similarity between the two. As there was a valid tactical

reason for not raising this objection, counsel was not ineffective.

The argument also did not prejudice defendant. The jury was instructed to follow the court's instructions on the law and to ignore any arguments by the attorneys inconsistent with its instructions. (CALJIC No. 1.00) The evidence against defendant was strong: Eva's testimony was essentially free of contradictions, her hysteria in the call to and her initial reaction when meeting her friends was consistent with having been sexually assaulted. Defendant gave inconsistent stories to the police and his DNA was found on Eva's breast. Any possible error in the prosecutor's argument could not have prejudiced defendant.

Since trial counsel was not deficient in failing to object and defendant was not prejudiced by this decision, defendant has not met his burden of establishing ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

_____, J.
NICHOLSON

We concur:

_____, Acting P. J.
SIMS

_____, J.*
DAVIS

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.